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# Bank Pembangunan Malaysia Bhd v Sidqi Ahmad Said bin Ahmad & Ors

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HIGH COURT (KUALA LUMPUR) — SUIT NO WA-22NCC-264–06 OF 2022
ATAN MUSTAFFA J
10 DECEMBER 2024

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*Civil Procedure — Preliminary question of law — Disposal of case on point of law — Plaintiff filed suit against defendants for fraud, conspiracy, breach of duties, and misappropriation of loan funds — Applicant filed application under O 33 r 2 and 5 and/or O 92 r 4 of Rules of Court 2012 to dispose plaintiff's action — Whether determination of preliminary issues would result in substantial saving of time and costs — Whether there existed relevant facts in dispute between parties — Whether questions regarding tracing and establishment of funds suitable for preliminary determination*

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A term loan facility was granted by Bank Pembangunan Malaysia Bhd ('the plaintiff') to Aries Telecoms (M) Bhd ('Aries') pursuant to a facility agreement. Under the facility agreement, the plaintiff provided a loan sum of RM400m to Aries. Aries made payments totalling RM509,764,525.25 to various entities. The plaintiff filed this suit against 30 defendants, including the applicants for fraud, conspiracy, breach of duties, and misappropriation of loan funds. The total claim amount was RM564,991,617.25, which represented the plaintiff's losses from the term loan facility originally granted to Aries. The plaintiff alleged that the late Dato' Mohd Zafer Mohd Hashim ie the plaintiff's president and group managing director received RM8m in bribes to waive conditions precedent and approve loan disbursements, the loan funds were commingled with Aries' revenues, and there was breach of Quistclose trust as the loan meant solely for a project was allegedly misused through payments to various defendants totalling over RM509m. The applicants filed an application under O 33 r 2 and 5 and/or O 92 r 4 of the Rules of Court 2012 seeking to have certain preliminary questions determined before proceeding with the full trial, particularly concerning issues of bribery allegations, the existence of a Quistclose trust in the loan arrangement, and questions about the co-mingling of funds. The applicants contended, inter alia, that: (a) there existed legal questions and/or facts that could be determined summarily for the disposal of this action in a just, expeditious and/or economical way; and (b) the questions could be examined through existing pleadings without having to go through a full trial.

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**Held**, dismissing the application with costs:

(1) The litigation as pleaded concerned an overarching conspiracy to defraud involving multiple defendants and various causes of action that were inherently interlinked. While the applicants sought determination of questions surrounding bribery and tracing of funds, these represented only two out of the ten core issues. Determining the posed questions would not significantly reduce the scope of trial in terms of either issues or parties. It would be a waste of time if after hearing preliminary issues, the litigation remained largely unresolved. The questions posed would at best resolve only a fraction of the pleaded issues while leaving the bulk of the substantive dispute requiring resolution at trial. Consequently, the determination of these questions in advance would not achieve the substantial saving of time and costs required to justify an O 33 application (see paras 36–38).

(2) There existed a clear conflict of factual evidence between the parties on the fundamental question of whether a Quistclose trust was created. The existence of a Quistclose trust depends on the totality of evidence including the surrounding circumstances and conduct of parties. These disputed matters of fact were not suitable for determination as preliminary issues under O 33 (see paras 42–44).

(3) The question of whether the plaintiff could establish legal ownership over specific sums paid by Aries to the various defendants, despite the commingling of the loan with Aries' revenues, involved complex factual inquiries unsuitable for determination as preliminary issues. The issues could not be fairly determined without a full ventilation of evidence at trial. Furthermore, as the plaintiff's claims involved multiple causes of action including dishonest assistance and breach of Quistclose trust, the tracing analysis could not be divorced from the broader allegations of fraud and conspiracy. The characterisation of payments as traceable to the loan funds may well depend on findings regarding the defendants' knowledge and conduct, matters which equally required thorough examination at trial. Therefore, the questions posed regarding tracing of funds and the plaintiff's locus standi over specific payments were unsuitable for preliminary determination under O 33 (see paras 48–51).

**[Bahasa Malaysia summary**

Kemudahan pinjaman berjangka telah diberikan oleh Bank Pembangunan Malaysia Bhd ('plaintif') kepada Aries Telecoms (M) Bhd ('Aries') menurut satu perjanjian kemudahan. Di bawah perjanjian kemudahan tersebut, plaintif telah menyediakan jumlah pinjaman sebanyak RM400 juta kepada Aries. Aries telah membuat pembayaran berjumlah RM509,764,525.25 kepada pelbagai entiti. Plaintif memfailkan guaman ini terhadap 30 defendan, termasuk pemohon, atas penipuan, konspirasi, pelanggaran tugas, dan penyalahgunaan dana pinjaman. Jumlah tuntutan adalah sebanyak RM564,991,617.25, yang mewakili kerugian plaintif daripada kemudahan pinjaman berjangka yang

asalnya diberikan kepada Aries. Plaintif mendakwa bahawa arwah Dato' Mohd Zafer Mohd Hashim, iaitu Presiden dan Pengarah Urusan Kumpulan plaintif, menerima rasuah sebanyak RM8 juta untuk mengetepikan syarat-syarat terdahulu dan meluluskan pengeluaran pinjaman, dana pinjaman telah dicampuradukkan dengan hasil Aries, dan terdapat pelanggaran amanah Quistclose kerana pinjaman yang dimaksudkan hanya untuk projek didakwa disalahgunakan melalui pembayaran kepada pelbagai defendan berjumlah lebih RM509 juta. Pemohon telah memfailkan permohonan di bawah A 33 k 2 dan 5 dan/atau A 92 k 4 Kaedah-Kaedah Mahkamah 2012 untuk mendapatkan keputusan mengenai soalan-soalan awalan tertentu sebelum meneruskan perbicaraan penuh, khususnya mengenai isu-isu dakwaan rasuah, kewujudan amanah Quistclose dalam urusan pinjaman, dan soalan-soalan mengenai percampuran dana. Pemohon berhujah, antara lain, bahawa: (a) terdapat soalan-soalan undang-undang dan/atau fakta yang boleh ditentukan secara ringkas untuk pelupusan tindakan ini dengan cara yang adil, cepat dan/atau menjimatkan; dan (b) soalan-soalan tersebut boleh diperiksa melalui pliding yang sedia ada tanpa perlu melalui perbicaraan penuh.

**Diputuskan**, menolak permohonan dengan kos:

(1) Litigasi yang diplidkan melibatkan konspirasi menyeluruh untuk menipu yang melibatkan pelbagai defendan dan pelbagai kausa tindakan yang sememangnya saling berkaitan. Walaupun pemohon mendapatkan penentuan soalan-soalan yang berkaitan dengan rasuah dan pengesanan dana, ini hanya mewakili dua daripada sepuluh isu teras. Menentukan soalan-soalan yang dikemukakan tidak akan mengurangkan skop perbicaraan dengan ketara dari segi isu atau pihak. Ia akan menjadi pembaziran masa jika selepas mendengar isu-isu awalan, litigasi kekal sebahagian besarnya tidak selesai. Soalan-soalan yang dikemukakan paling baik menyelesaikan hanya sebahagian kecil daripada isu-isu yang diplidkan, meninggalkan sebahagian besar pertikaian substantif memerlukan penyelesaian di perbicaraan. Akibatnya, penentuan soalan-soalan ini lebih awal tidak akan mencapai penjimatan masa dan kos yang ketara yang diperlukan untuk mewajarkan permohonan A 33 (lihat perenggan 36–38).

(2) Terdapat percanggahan yang jelas dalam keterangan fakta antara pihak-pihak mengenai persoalan asas sama ada amanah Quistclose telah diwujudkan. Kewujudan amanah Quistclose bergantung pada keseluruhan keterangan termasuk keadaan sekeliling dan kelakuan pihak-pihak. Perkara-perkara fakta yang dipertikaikan ini tidak sesuai untuk ditentukan sebagai isu-isu awalan di bawah A 33 (lihat perenggan 42–44).

(3) Soalan sama ada plaintif boleh mewujudkan pemilikan sah ke atas jumlah tertentu yang dibayar oleh Aries kepada pelbagai defendan,

walaupun terdapat pencampuran pinjaman dengan hasil Aries, melibatkan pertanyaan fakta yang kompleks yang tidak sesuai untuk penentuan sebagai isu-isu awalan. Isu-isu tersebut tidak dapat ditentukan dengan adil tanpa ventilasi penuh bukti di perbicaraan. Tambahan pula, kerana tuntutan plaintif melibatkan pelbagai kausa tindakan termasuk bantuan tidak jujur dan pelanggaran amanah Quistclose, analisis pengesanan tidak dapat dipisahkan daripada dakwaan penipuan dan konspirasi yang lebih luas. Pencirian pembayaran sebagai boleh dikesan kepada dana pinjaman mungkin bergantung pada penemuan mengenai pengetahuan dan kelakuan defendan, perkara-perkara yang sama-sama memerlukan pemeriksaan teliti di perbicaraan. Oleh itu, soalan-soalan yang dikemukakan mengenai pengesanan dana dan locus standi plaintif ke atas pembayaran tertentu tidak sesuai untuk penentuan awalan di bawah A 33 (lihat perenggan 48–51).]

**Cases referred to**

*AIA Bhd v Dr Tan Siew Hui* [2020] MLJU 351, HC (refd)
*Badan Perhubungan UMNO Negeri Pahang v PP and other appeals* [2022] 4 MLJ 699, CA (refd)
*Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567, HL (refd)
*Chan Kum Loong v Hii Sui Eng* [1980] 1 MLJ 313; [1979] 1 LNS 10, FC (refd)
*DNA Bentera Sdn Bhd v Maju Struktur Sdn Bhd & Ors* [2021] MLJU 1501, HC (refd)
*Hiap Soon Hong Sdn Bhd v Leopad Assets Sdn Bhd* [2018] 1 LNS 664, CA (folld)
*Jagdis Singh a/l Banta Singh v Zakaria bin Yahaya & Anor* [2019] 1 MLJ 774, CA (refd)
*Mat Shah bin Safuan v Amber Memory Sdn Bhd* [2020] MLJU 1569, HC (refd)
*Petroleum Nasional Bhd v Kerajaan Negeri Terengganu* [2004] 1 MLJ 8, CA (refd)
*PP v Kuala Dimensi Sdn Bhd & Ors* [2018] 6 MLJ 37, CA (refd)
*Twinsectra Ltd v Yardley and others* [2002] 2 WLR 802, HL (refd)

**Legislation referred to**

Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001
Rules of Court 2012 O 33, O 33 rr 2, 3(2), 5

*Lim Chee Wee (with Nathalie Ker Si Min, Pang Huey Lynn, Charmaine Choong and Saradha Lakshmi) (Lim Chee Wee Partnership) for the plaintiff.*
*Syamsul Azhar Ab Aziz (with Sasha) (Azhar Aziz & Assoc) for the fourth, sixth, seventh, eight, ninth, 11th, 17th, 22nd, 24th and 25th defendants.*

**Atan Mustaffa J:**

**[1]** This judgment concerns an application under O 33 rr 2 and 5 of the Rules of Court 2012 to determine certain preliminary issues in a complex banking fraud case involving multiple defendants. The underlying dispute arises from a term loan facility of RM400m granted by a bank, where the borrowed funds were allegedly misappropriated through various fraudulent schemes and transfers to different entities. The applicants seek to have several threshold questions determined before trial, particularly concerning the civil court's jurisdiction over bribery allegations, the existence of a Quistclose trust in the loan arrangement, and issues surrounding the tracing of commingled funds. These questions are posed against a backdrop of multiple interrelated causes of action including fraud, conspiracy, breach of trust, dishonest assistance, and knowing receipt. The key consideration before this court is whether these issues are suitable for preliminary determination under O 33, which requires both the potential for substantial saving of time and costs, and the absence of disputed facts between parties.

BACKGROUND FACTS

**[2]** The present application involves Bank Pembangunan Malaysia Bhd as plaintiff and several defendants including Roslina bt Ibrahim (fourth defendant), Muhammad Shazhakim bin Shazarul Hisham (seventh defendant), Shaza Arina bt Shazarul Hisham (eight defendant), Mustafa Ali Zaminali Sayed (ninth defendant), Abd Hadi bin Abd Majid (11th defendant), VCB Investment Bhd (17th defendant), Orient Telecoms Sdn Bhd (22nd defendant), BVS Trinity Sdn Bhd (24th defendant), and VCB Malaysia Bhd (25th defendant) ('the applicants').

**[3]** The case concerns a term loan facility granted by the plaintiff to Aries Telecoms (M) Bhd ('Aries') pursuant to a facility agreement dated 28 Jun 2012 ('facility agreement'). Under the facility agreement, the plaintiff provided a loan sum of RM400m ('loan sum') to Aries.

**[4]** The loan sum was disbursed in two tranches: the first tranche of RM200m was disbursed on 2 July 2012, and the second tranche of RM200m was disbursed on 15 November 2013. According to the plaintiff's repayment schedule as at 13 January 2016, Aries made several installment payments towards repayment of the facility agreement up to installment No 7, totaling approximately RM95.7m.

**[5]** Between July 2012 and 2016, Aries made payments totaling RM509,764,525.25 to various entities, including RM499,164,225.25 to Paneagle Holdings Bhd (the 15th defendant), RM9.5m to BVS Trinity Sdn

Bhd (the 24th defendant) in two tranches: RM400,000 to VCB Malaysia Bhd (the 25th defendant), and RM700,300 to Primawin Ltd (the 19th defendant).

**[6]** A key individual in the case, Dato' Mohd Zafer Mohd Hashim ('Dato' Zafer'), the plaintiff's president and group managing director from 5 August 2009 until his resignation on 25 July 2014, is deceased. His estate is represented by two joint administrators: Izlin bt Ismail (the 28th defendant) and Muhammad Radzi bin Mohd Zafer (the 29th defendant).

**[7]** The fourth defendant, Roslina bt Ibrahim, serves as a director in the Orient Telecoms Sdn Bhd (the 22nd defendant), BVS Trinity Sdn Bhd (the 24th defendant) and VCB Malaysia Bhd (the 25th defendant).

**[8]** The Malaysian Anti-Corruption Commission ('MACC') was involved in investigating aspects of the case and issued a 'no further action' notice regarding Dato' Zafer.

**[9]** The plaintiff filed this suit (Suit WA-22NCC-264–06 of 2022) in June 2022 against 30 defendants, including the applicants for fraud, conspiracy, breach of duties, and misappropriation of loan funds. The total claim amount is RM564,991,617.25, which represents the plaintiff's losses from the term loan facility originally granted to Aries. The plaintiff alleges in the claim that Dato' Zafer received RM8m in bribes to waive conditions precedent and approve loan disbursements, the loan funds were commingled with Aries' revenues, and there was breach of Quistclose trust as the loan meant solely for a project was allegedly misused through payments to various defendants totaling over RM509m. While the bank had obtained judgment against Aries in in Kuala Lumpur High Court Suit No WA-22NCC-313–07 of 2018 (Suit 313) for recovery of amounts due under the facility agreement, this suit claims different causes of action including fraud, conspiracy, breach of Quistclose trust, dishonest assistance, and knowing receipt.

**[10]** On 25 July 2023, the applicants filed an application under O 33 rr 2 and 5 and/or O 92 r 4 of the Rules of Court 2012 in encl 445. This application seeks to have certain preliminary questions determined before proceeding with the full trial, particularly concerning issues of bribery allegations, the existence of a Quistclose trust in the loan arrangement, and questions about the co-mingling of funds.

ENCLOSURE 445

**[11]** The application in encl 445 is brought by the applicants under O 33 rr 2 and 5 and/or O 92 r 4 of the Rules of Court 2012. It seeks to have certain preliminary questions determined before proceeding with the full trial, with a

view that the plaintiff's claim should be struck out if these questions are determined in favor of these defendants.

**[12]** The questions proposed to be tried in advance as they appear in encl 445 are:

A. QUESTIONS RELATING TO BRIBERY

1.1 Whether the Plaintiff can maintain its entire cause of action in this Honorable Civil Court, specifically on the issues of fraud and conspiracy to defraud against D4, D7 to D9, D11, D17, D22, D24 and/or D25 where the Plaintiff pleads — as the crux and/or as the crutch to its claim — that Zafer was bribed and as a result of the alleged bribe Zafer subsequently authorised temporary waivers and/or exemptions of the conditions precedent to the payments of the loan amount to Aries — in the absence of any criminal conviction for bribery, the MACC's issuance of 'No Further Action' ('NFA') to Zafer last year and the absence of Zafer's availability to attend trial?

1.2 In the event that Question 1.1 is in the affirmative (that this Honorable Court have the jurisdiction to hear and make a finding of bribery):

1.2.1 whether the non-prosecution and the status of the MACC's 'No Further Action' (NFA) against Zafer will impact and/or impede any judicial (and evidential) finding(s)) by the Civil Court on bribery against Zafer without violating the requirements to conduct fair trials and to prevent abuse of court process;

1.2.2 whether the non-attendance of the deceased Zafer being the alleged recipient of the alleged bribe will impact and/or impede any judicial finding(s) by the civil court on bribery against Zafer in Zafer's absence without violating the requirements to conduct fair trials and to prevent abuse of court process;

1.3 Whether it is incumbent on the party including the Court and/or the Plaintiff hereto having judicial notice or otherwise direct knowledge of an admission of bribe-giving (being fresh evidence for criminal investigation) to refer the matter for criminal prosecution and in the interim for this matter to be stayed indefinitely until the criminal prosecution and conviction of the relevant parties;

B. QUESTIONS RELATING TO THE PLEADING FOR QUISTCLOSE TRUST

2.1 Whether a Quistclose trust exists in the loan provided by the Plaintiff to Aries?

2.2 If the answer to 2.1 is negative, whether the Plaintiff can still maintain this entire Suit?

2.3 If the answer to 2.1 is affirmative, whether the Plaintiff can maintain its cause of action, specifically for the Quistclose trust against D4, D7 to D9, D11, D17, D22, D24 and/or D25 when the Plaintiff does not name Aries as party to the proceeding;

C. QUESTIONS RELATING TO THE CO-MINGLING AND/OR SEGREGATION OF FUNDS

3.1 Whether the Plaintiff has established and proved or will be able to establish or prove its locus standi or legal ownership over the sums of RM9,500,000.00 paid by

Aries to D24 and RM400,000.00 paid by Aries to D25 ('the Sums')? In other words, whether the Plaintiff has proved or will be able to prove that the Sums sourced and came from the loan of the Plaintiff despite the loan had been co-mingled with Aries' revenues before the Sums were made by Aries to D24 and D25?

3.2 Whether the Plaintiff has a defective claim against D24 and D25 whereby the Plaintiff has no locus standi to bring such claims over the sums of RM9,500,000.00 paid by Aries to D24 (on 29.1.2016 and 14.3.2018) and RM400,000.00 paid by Aries to D25 (on 28.5.2018), given that it is also the Plaintiff's defective claim that Aries 'siphoned RM499,164,225.25 of RM400 million of the Plaintiff's loan' to Paneagle Holdings Bhd (D15) from July 2012 till 2016, ie earlier than the Sums paid by Aries to D24 and D25 respectively?

**[13]** The application is grounded on three main bases. First, the applicants contend that there exist legal questions and/or facts that can be determined summarily for the disposal of this action in a just, expeditious and/or economical way. Second, they argue that these questions can be examined through existing pleadings without having to go through a full trial. Third, they assert that the plaintiff's pleadings may exclude any requirement for a full trial given several fundamental issues: the civil court's jurisdiction to make findings of bribery in the absence of criminal prosecution, the effect of MACC's 'no further action' notice regarding Dato' Zafer, the practical impossibility of trying bribery allegations when Dato' Zafer is deceased, the implications of fund co-mingling on the plaintiff's claims to specific sums of money, and questions about whether the Quistclose trust pleading can be sustained in the plaintiff's circumstances. The applicants contend that these threshold issues, if determined in their favor, would be dispositive of the entire suit.

SUBMISSIONS OF THE APPLICANTS

**[14]** The applicants submit that there are three main questions for determination by the court in their O 33 applications, namely: (a) whether the civil courts have jurisdiction over claims of bribery in the absence of criminal conviction; (b) whether a Quistclose trust exists in this case; and (c) whether the plaintiff can establish its locus standi over co-mingled funds.

**[15]** According to the applicants, the entire foundation of the plaintiff's case rests on allegations of bribery against Dato' Zafer, which they argue cannot be determined by a civil court in the absence of any criminal conviction and given the MACC's 'no further action' (NFA) decision. They contend that allowing the civil court to make findings on bribery would amount to usurping the function of criminal courts.

**[16]** A central argument advanced by the applicants is that the plaintiff

cannot establish a Quistclose trust, as the facility agreement expressly stated that the plaintiff was not obliged to monitor utilisation of funds. They emphasise that the lack of segregation of the loan monies and its co-mingling with Aries' business revenues is fatal to any claim of a trust relationship.

**[17]** The applicants further assert that due to the co-mingling of the loan amount of RM400m with Aries' own revenues of RM644m, it is impossible for the plaintiff to prove that any specific payments made by Aries came from the loan monies. They highlight that the plaintiff is claiming RM509m when the loan itself was only RM400m.

**[18]** In the applicants' view, determining these preliminary issues would result in substantial savings of time and costs, as they go to the heart of the plaintiff's causes of action. They argue that if any of these threshold issues is determined in their favor, the entire suit would be unsustainable and should be dismissed.

SUBMISSIONS OF THE PLAINTIFF

**[19]** The plaintiff submits that the O 33 applications should be dismissed as they do not result in substantial savings of time and costs. According to the plaintiff, the issues raised are interrelated and would be more efficiently ventilated together at trial.

**[20]** In the plaintiff's view, there are clear disputes of fact between the parties that have not been resolved through agreed facts, which is a fundamental requirement for O 33 applications. The plaintiff contends that these factual disputes make the applications inappropriate.

**[21]** On the issue of bribery, the plaintiff maintains that civil courts have jurisdiction to hear claims based on bribery as a civil cause of action, regardless of any criminal proceedings or lack thereof. They argue that civil bribery claims operate independently of criminal matters and are subject to the civil standard of proof.

**[22]** With regards to the doctrine of election, the plaintiff asserts that there is no issue of double recovery as the current suit is premised on different causes of action against different defendants compared to their earlier suit for loan recovery.

**[23]** The plaintiff argues strongly that third parties who were not part of the loan agreement can still be trustees under a Quistclose trust. They further contend that segregation of funds is not an essential element to prove a Quistclose trust exists.

**[24]** On the issue of commingling of funds, the plaintiff posits that this is a matter that should be determined at trial through proper evidence, rather than as a preliminary issue. They maintain that the tracing of funds requires detailed examination of evidence.

**[25]** The plaintiff highlights that the O 33 applications appear to be an abuse of process, as many of the issues raised have already been ventilated in striking out applications filed by the defendants. According to them, this represents an improper attempt to rehear matters already before the court.

## THE LAW ON O 33 APPLICATIONS

**[26]** Order 33 r 2 of the Rules of Court 2012 provides:

> The Court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated.

**[27]** Order 33 r 3(2) further provides:

> In any such action, different questions or issues may be ordered to be tried by different modes of trial and one or more questions or issues may be ordered to be tried before the others.

**[28]** Rule 5 sets out the court's power following determination of a preliminary issue:

> If it appears to the Court that the decision of any question or issue arising in a cause or matter and tried separately from the cause or matter substantially disposes of the cause or matter or renders the trial of the cause or matter unnecessary, it may dismiss the cause or matter or make such other order or give such judgment therein as may be just.

**[29]** The application of these provisions involves a two-stage process, as explained by the High Court in *AIA Bhd v Dr Tan Siew Hui* [2020] MLJU 351:

> [28] Even if the sessions court was of the opinion that the issue of liability could be decided as a preliminarily issue, it should have made an order to that effect and give directions for the hearing for the determination of the preliminary issue. That would be the first stage. Then only would the sessions court hear the issue proper in the manner directed and make a decision thereon. That would be the second stage.

**[30]** The key consideration in determining whether to allow an O 33 application was set out by the Court of Appeal in *Petroleum Nasional Bhd v Kerajaan Negeri Terengganu* [2004] 1 MLJ 8:

> As a general rule, the court will exercise its power under O 33 r 2 if and only if the trial of the question will result in a substantial saving of time and expenditure which otherwise would have to be expended should the action go to trial as a whole.

**[31]** Additionally, the Court of Appeal in *Hiap Soon Hong Sdn Bhd v Leopad Assets Sdn Bhd* [2018] 1 LNS 664 emphasised that O 33 applications require undisputed facts:

> [26] In order for O 33 to have any efficacy, it is necessary for the judge to ensure, at the outset, that the relevant facts are not disputed. This can be done by ordering the parties either to agree to the facts stated in the pleadings or to file an agreed statement of facts.

**[32]** These authorities establish that for an O 33 application to succeed, the preliminary questions must be capable of substantially disposing of the action or achieving significant time and cost savings, and the relevant facts must not be in dispute between the parties.

## ANALYSIS AND FINDINGS OF THE COURT

### *Whether determination of the preliminary issues would result in substantial saving of time and costs*

**[33]** The applicants contended that decisively determining specific issues — particularly those surrounding bribery and tracing of funds — at this preliminary stage would avoid the need for a full trial and obviate associated costs. They argued that if the court were to find in their favour on issues such as the court's jurisdiction to determine bribery allegations in light of the MACC's 'no further action' decision, or on questions regarding the tracing of co-mingled funds, this would dispose of the entire action. The applicants submitted that this would achieve the purpose of O 33 of the Rules of Court 2012 in substantially saving time and costs.

**[34]** The plaintiff opposed this, arguing that the litigation involves numerous interrelated causes of action against multiple defendants, with the bribery allegations forming just one aspect of a broader conspiracy to defraud. The plaintiff pointed to its amended statement of claim which sets out some 29 causes of action, including dishonest assistance, knowing receipt, and breach of Quistclose trust, which would still require full ventilation at trial regardless of how the preliminary issues are determined.

**[35]** Having carefully considered these submissions, I find the applicants' position untenable. The Court of Appeal in *Petroleum Nasional Bhd v Kerajaan Negeri Terengganu* established that the central test for O 33 applications is whether determination of the questions posed would result in substantial

saving of time and expenditure. On the facts before me, this threshold is not met.

**[36]** The litigation as pleaded concerns an overarching conspiracy to defraud involving multiple defendants and various causes of action that are inherently interlinked. While the applicants seek determination of questions surrounding bribery and tracing of funds, these represent only two out of the ten core issues identified from the plaintiff's pleadings, namely: (a) misrepresentation in financial statements; (b) waiver of conditions precedent; (c) conflict of interest involving Silver Ridge; (d) siphoning of funds from Aries; (e) fraud; (f) conspiracy to defraud; (g) breach of duties, breach of trust and/or negligence; (h) dishonest assistance by all defendants; (i) knowing receipt by Paneagle Holdings Bhd, BVS Trinity Sdn Bhd, VCB Malaysia Bhd, Primawin Ltd and Orient Telecoms Sdn Bhd; and (j) breach of Quistclose trust. Even if decided in the applicants' favour, several other substantive issues including dishonest assistance, knowing receipt and breach of Quistclose trust would still require full ventilation through witness testimony and documentary evidence at trial.

**[37]** The High Court in *Hiap Soon Hong Sdn Bhd v Leopad Assets Sdn Bhd* cautioned against employing O 33 procedures where they would not lead to substantial savings in judicial time. Following this guidance, I find that determining the posed questions would not significantly reduce the scope of trial in terms of either issues or parties. Rather, as observed by the Federal Court in *Chan Kum Loong v Hii Sui Eng* [1980] 1 MLJ 313; [1979] 1 LNS 10, it would be a waste of time if after hearing preliminary issues, the litigation remains largely unresolved. This observation is particularly apt here where the questions posed would at best resolve only a fraction of the pleaded issues while leaving the bulk of the substantive dispute requiring resolution at trial.

**[38]** Consequently, I am not satisfied that the determination of these questions in advance would achieve the substantial saving of time and costs required to justify an O 33 application. This conclusion alone is sufficient to warrant dismissal of the application.

*Whether there exist relevant facts in dispute between the parties*

**[39]** The applicants contended in their O 33 application that the questions posed, particularly regarding the existence of a Quistclose trust, could be determined as preliminary issues based on the documents before the court. They submitted that the facility agreement between the plaintiff and Aries contained no requirements for segregation of funds or monitoring of the loan's utilisation, which they argued was fatal to the establishment of a Quistclose trust. The applicants relied specifically on section 4.02(b) of the facility

agreement which provided that 'the Bank shall not be obliged to monitor the utilisation of the Facility by the Borrower nor to ensure that the Facility is indeed used for the purpose stated in subsection (a)'.

**[40]** The plaintiff, in opposition, submitted that segregation of assets is not an essential element to prove a Quistclose trust. The plaintiff relied on the House of Lords decision in *Twinsectra Ltd v Yardley and others* [2002] 2 WLR 802, where the argument of segregating funds was raised but the court nonetheless found that a Quistclose trust subsisted. The plaintiff exhibited evidence through affidavits setting out its position that the loan was disbursed for the sole purpose of funding the project, and that this created a Quistclose trust over the funds disbursed.

**[41]** A Quistclose trust, which got its name from the case of *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567 decided by the House of Lords, is a form of trust that arises when money is lent for a specific purpose, creating a relationship where the borrower must use the funds only for that stated purpose. If the specified purpose fails or cannot be carried out, the money must be returned to the lender, and in the event of the borrower's insolvency, the funds are protected from other creditors as they are held on trust. This arrangement effectively creates a hybrid between a loan and a trust, providing security for lenders by ensuring their money either gets used for its intended purpose or is returned to them, rather than becoming part of the borrower's general assets available to creditors.

**[42]** I find merit in the plaintiff's position. The High Court in *Mat Shah bin Safuan v Amber Memory Sdn Bhd* [2020] MLJU 1569 held that if there is even a minor point of dispute of facts which requires a finding to be made, O 33 r 2 of the Rules of Court 2012 is not the appropriate avenue. Here, there exists a clear conflict of factual evidence between the parties on the fundamental question of whether a Quistclose trust was created. This includes disputes over whether there was mutual intention for the funds to be impressed with a trust, whether the loan's purpose was sufficiently specific, and whether the absence of segregation requirements negates the trust relationship.

**[43]** The Court of Appeal in *Jagdis Singh a/l Banta Singh v Zakaria bin Yahaya & Anor* [2019] 1 MLJ 774 has established that a Quistclose trust arises when assets are given to a person for a specific purpose, and reverts if such purpose fails. The determination of whether these elements are satisfied in the present case necessarily requires examination of witness testimony regarding the parties' intentions and conduct. The applicants' reliance on section 4.02(b) of the facility agreement alone does not conclusively resolve this issue, as the existence of a Quistclose trust depends on the totality of evidence including the surrounding circumstances and conduct of parties.

**[44]** These disputed matters of fact are not suitable for determination as preliminary issues under O 33. As held by the High Court in *Hiap Soon Hong Sdn Bhd v Leopad Assets Sdn Bhd*, for O 33 to have any efficacy, it is necessary for the judge to ensure at the outset that the relevant facts are not disputed. This requires either agreement between parties on the facts stated in the pleadings or the filing of an agreed statement of facts. Neither condition is satisfied in the present case. The existence of these fundamental factual disputes therefore precludes the determination of the questions posed as preliminary issues under O 33.

*Tracing and establishment of funds*

**[45]** The applicants contend that due to the commingling of the plaintiff's RM400m loan with Aries' business revenues of RM644m from 2010–2016 in the same bank account, and the fact that payments totalling RM509m were subsequently made to various defendants, it would be impossible for the plaintiff to establish which portions of these payments originated from the loan rather than Aries' own revenues. They argue that this inability to trace the source of funds is fatal to the plaintiff's claims of knowing receipt and other proprietary remedies, citing the decision of Lim Chong Fong J (as he then was) in *DNA Bentera Sdn Bhd v Maju Struktur Sdn Bhd & Ors* [2021] MLJU 1501.

**[46]** The applicants further rely on the Court of Appeal decision in *Public Prosecutor v Kuala Dimensi Sdn Bhd & Ors* [2018] 6 MLJ 37, which held that where monies have been mixed together with other legitimately earned funds, it becomes impossible to identify and separate specific sums for the purposes of tracing. They also cite *Badan Perhubungan UMNO Negeri Pahang v Public Prosecutor and other appeals* [2022] 4 MLJ 699 where the Court of Appeal found that mere evidence of money trails without proof of the specific source of funds was insufficient.

**[47]** The plaintiff counters that the lack of segregation of funds is not fatal to its claims and that tracing is possible through forensic accounting evidence yet to be adduced at trial. The plaintiff submits that the authorities relied upon by the applicants are distinguishable as they concerned different contexts, particularly criminal forfeiture proceedings under the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('the AMLA') where different considerations apply. The plaintiff argues that the existence of commingled funds is precisely why a full trial with witness testimony and expert evidence is necessary to trace the flow of funds.

**[48]** In my view, the question of whether the plaintiff can establish legal ownership over specific sums paid by Aries to the various defendants, despite the commingling of the loan with Aries' revenues, involves complex factual

inquiries unsuitable for determination as preliminary issues. The plaintiff will need to adduce detailed documentary and witness evidence to establish the money trail from the loan disbursement to the impugned payments. This may include testimony from forensic accountants, bank officers, and the receiver and manager appointed over Aries. The plaintiff has also indicated that ongoing investigations may yield additional evidence relevant to tracing the funds.

**[49]** While the applicants' arguments on the implications of commingled funds are not without merit, I am not satisfied that these issues can be fairly determined without a full ventilation of evidence at trial. The authorities cited, while instructive on the challenges posed by commingled funds, do not establish an absolute bar to tracing in civil proceedings. Rather, they underscore the need for comprehensive evidence to establish the source and movement of funds — evidence that can only be properly tested through cross-examination at trial.

**[50]** Furthermore, as the plaintiff's claims involve multiple causes of action including dishonest assistance and breach of Quistclose trust, the tracing analysis cannot be divorced from the broader allegations of fraud and conspiracy. The characterisation of payments as traceable to the loan funds may well depend on findings regarding the defendants' knowledge and conduct, matters which equally require thorough examination at trial.

**[51]** For these reasons, I find that the questions posed regarding tracing of funds and the plaintiff's locus standi over specific payments are unsuitable for preliminary determination under O 33. These issues are inextricably linked with disputed questions of fact that warrant full exploration through witness testimony and documentary evidence at trial.

CONCLUSION

**[52]** The applicable legal principles governing O 33 applications are well established. As articulated by the Court of Appeal in *Petroleum Nasional Bhd v Kerajaan Negeri Terengganu*, the overriding consideration is whether the preliminary determination would result in a substantial saving of time and expenditure. The High Court in *AIA Bhd v Dr Tan Siew Hui* further elucidated that an O 33 application involves a two-stage process — first determining if the issue could be decided as a preliminary issue, and if so, proceeding to hear the substantive question. Additionally, as emphasised by the Court of Appeal in *Hiap Soon Hong Sdn Bhd v Leopad Assets Sdn Bhd*, for O 33 to be applied, there must be no relevant facts in dispute between the parties.

**[53]** Having carefully scrutinised the present application against these

established principles, I find that the issues framed by the applicants fail to satisfy either prerequisite. First, given the complex and interrelated nature of the plaintiff's 29 causes of action against multiple defendants, a preliminary determination of selected issues would not meaningfully advance the matter or result in appreciable time and cost savings. Second, and perhaps more fundamentally, there exist multiple material factual disputes between the parties that can only be resolved through oral evidence and cross-examination at trial. These include, but are not limited to, the existence of a Quistclose trust, the tracing of commingled funds, and the broader allegations of fraud and conspiracy. For these reasons, I am constrained to find that encl 445 fails to fulfil the dual preconditions necessary for an O 33 determination. The application is accordingly dismissed with costs.

*Application dismissed with costs.*

Reported by Nabilah Syahida Abdullah Salleh